identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

B5

DATE: MAY 25 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal. The AAO will also enter a finding of willful misrepresentation of a material fact.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner is a mathematics teacher at [redacted] The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel asserts that the director failed to consider relevant evidence, and that the petitioner's employer has fulfilled the substantive requirements for labor certification.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by

increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on April 21, 2009. In an accompanying cover letter, counsel stated:

> The [evidence] clearly shows that [the petitioner] is a person of exceptional ability in the field of Teaching Math, a member of the professions and is deserving of exemption [from] Labor Certification, insofar as her pioneering work contributes

> directly, and in a critical way, to the U.S. national interest by her devising Math games which is due for distribution in the U.S.
>
> Also the regular Labor Certification process will be prejudicial to the interest of the United States because the current economic and financial crises demands [*sic*] her skills to restart the economy immediately. Also the requirement for the job involves a combination of duties and qualifications, thus it will not pass through the regular Labor Certification process. Moreover, due to budget cuts, the School may no longer afford to maintain [the petitioner] on a fixed salary on a permanent basis.

The last sentence quoted above indicates that the employer may have difficulty meeting the terms of the job offer requirement. The USCIS regulation at 8 C.F.R. § 204.5(g)(2) requires the employer to establish its ability to pay the alien's proffered wage. Counsel appears to acknowledge that the school cannot meet that requirement. Nevertheless, the statutory standard for the waiver is not the employer's inability to meet the job offer requirement. Rather, the statute requires that the waiver serve the national interest. Counsel's assertion about the beneficiary's uncertain employment future does not establish that her continued work is in the national interest. Rather, the assertion serves only to cast doubt on her ability to continue performing that work.

Counsel did not explain how the petitioner's work as a math teacher will enable her "to restart the economy immediately." The petitioner has already been working as a math teacher before filing the petition, and the record contains no evidence that her work, to date, has had a measurable effect on the national economy. The petitioner has not shown or explained how the waiver, or other immigration benefits, would impart a national effect to her work that, so far, has not been evident.

Counsel wrote a "Summary of Qualifications" for the petitioner, citing five factors as "evidence of [the petitioner's] exceptional ability in [redacted]

1. Conducted after-school tutoring program at MS 143, which resulted in the significant increase of students' performance in citywide exams.
2. Developed teaching aid entitled, "An EQUANGO Game for Mathematics students and teachers." This teaching aid helped students to master skills in solving linear equations in one variable from simple equations to complex equations involving fractions and decimal in gaming experience.
3. Developed curriculum material to teach, "Maxima and minima problems" for secondary students in a cooperative learning atmosphere. This technique has developed student's [*sic*] positive interdependence using manipulative and graphing techniques to introduce concepts in finding the zeroes of a polynomial function.
4. Organized and conducted seminar-workshops on Thinking Skills Development for Maximized Cognitive Performance.
5. Managed Community Immersion Program (off-campus practice teaching).

The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Furthermore, even if the petitioner had unequivocally established exceptional ability as a math teacher, the AAO has already explained that, by statute, exceptional ability in one's field does not guarantee or imply eligibility for the waiver.

Counsel asserted that the petitioner's "[redacted] made it possible for her teaching aid to reach any Math Student in the United States. In addition . . . , she is working on a website to offer online tutoring services to students using the [redacted] The record contains no evidence that [redacted] is nationally distributed, or that any plans are afoot for such distribution, or that the petitioner has yet offered online tutoring services. An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Furthermore, the petitioner has not shown that Equango or online tutoring are part of her defined duties as a teacher at [redacted] The petitioner's claimed plans to eventually branch out into those areas do not impart national scope to her occupation as a high school math teacher.

In an accompanying personal statement entitled "The Need for Quality Teachers in US Classrooms," the petitioner cited statistics about problems in the educational system in the United States, including "the insidious . . . achievement gap between minority and white students." The petitioner stated: "As part of the solution to this US global and local problem of closing the academic achievement gap, I offer my continued service as a high quality educator to the US government of Department of Education [*sic*], particularly in the City of Philadelphia."

The petitioner claimed that test scores rose at the [redacted] where she used to work, and that her present employer in [redacted] has received Academic Yearly Progress Awards every year since she joined its faculty. The petitioner, however, submitted no evidence to support these claims. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

On July 30, 2009, the director issued a notice of intent to deny the petition, stating that the petitioner had not established the impact or influence of her work, such as through other schools' adoption of her methods or innovations.

In response, counsel stated that the petitioner "is the founder of a non-profit organization and has a website . . . [called] ***mathnotebook.org***" (counsel's emphasis), and that the petitioner had filed a patent application for her [redacted] Counsel stated that the principal of [redacted]

[redacted] proposed to "incorporate [the game] as one of their math activities in the classroom," and that the petitioner intended "to promote these games nation-wide."

The record does not identify the petitioner's claimed "non-profit organization" or contain any evidence of its existence or its non-profit status. What appear to be printouts from the petitioner's web site state that the site is "under construction," and that "We Are A team of professionals founded by [redacted]' The record does not identify any members of the "team of professionals" other than the petitioner herself, and the petitioner submitted no evidence that mathnotebook.org web site was a "live" site, accessible online through the World Wide Web.

The petitioner's initial submission did not indicate that the web site existed, or that the petitioner had filed a patent application. The record does not show when the petitioner launched the web site, and there is no date on her provisional patent application. A photocopy of her check, payable to the U.S. Patent and Trademark Office, is dated September 1, 2009, more than a month after the issuance of the director's notice, and more than four months after the petition's filing date. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1998).

As noted previously, the petitioner must be eligible for the benefit sought as of the petition's filing date. 8 C.F.R. § 103.2(b)(1). Actions taken after the filing date, such as the filing of a patent application, cannot retroactively show that the petitioner already qualified for the benefit before she took those actions. There are some web sites and patented inventions/innovations that benefit the United States through activities on a web site, but it does not follow that operating a web site and applying for a patent invariably demonstrate the petitioner's eligibility for the waiver. The AAO notes that the *NYSDOT* decision states that "an alien cannot secure a national interest waiver simply by demonstrating that he or she holds a patent. Whether the specific innovation serves the national interest must be decided on a case by case basis." *Id.* at 221, n.7. In this instance, the petitioner has not even shown that she holds a patent. She has shown only that she applied for one after learning that her initial evidence was deficient.

Counsel claimed that the petitioner "has already received phone calls from parents and students from California, Alaska, Hawaii, Michigan, Florida [and] Texas who are waiting for the Math game to come out." The record contains no evidence to support this claim, and counsel's unsupported assertion cannot suffice under [redacted]. The acknowledgement that the game has not yet "come out" underscores the lack of evidence of the game's existing impact.

The petitioner submits documentation to show that [redacted] represented by the same attorney serving as counsel in the present proceeding, applied for a labor certification on the alien's behalf on December 29, 2008. The U.S. Department of Labor (DOL) denied the application for two reasons: the employer's failure to submit a completed and signed application, and untimely filing of "the job order." The employer's failure to follow proper procedures to apply for labor certification does not in any way imply that it is in the national interest to waive the job offer requirement on the alien's behalf.

The director denied the petition on November 3, 2009, stating that the petitioner has not shown that her existing body of work has had any significant impact or influence. On appeal, counsel states that the director failed to consider "the past and present experiences of [the petitioner] in teaching Math and in producing Math Games as projections of future benefit to the national interest."

Counsel, on appeal, fails to explain how the petitioner's "past and present experiences" distinguish her from other qualified math teachers. With respect to the "Math Games," the record identifies only one math game that the petitioner has created, and there is no evidence that the game is an effective teaching tool, much less that the game has had an impact beyond the school where the petitioner worked when she created it. The petitioner has not shown that the use of original games is a significant new development in pedagogy, rather than a routine part of a teacher's curriculum design.

Counsel states that the director should have taken into account the petitioner's "efforts to comply with the Labor Certifications [*sic*] process." Counsel asserts:

> The inherent national interest in protecting U.S. workers has been served since [the petitioner] has already undergone the Labor Certification process where advertisements were made and interviews were conducted. The only reason why it was not approved was because of a technicality, that the Petitioner failed to sign the Application on time.

The assertion that the director should have considered the petitioner to be, effectively, the beneficiary of a labor certification is without merit. The DOL denied the labor certification application. If there were no functional difference between a labor certification and an application for a labor certification, then there would be no point to actually filing the application. The DOL did not state that it would have approved the labor certification, but for the "technicality" that resulted in the denial. Rather, the denial notice indicated that, because the employer failed to follow the correct procedure, there would be no determination on the application's merits. Even then, counsel fails to explain how the denial of a labor certification application shows that the petitioner's work will prospectively serve the national interest.

The AAO agrees with the director's finding that the petitioner has not shown the impact or influence of her existing work. The assertion that works in progress such as her web site and Equango game will, one day, significantly improve math education throughout the United States amounts to little more than speculation. The alien must have established, in some capacity, the ability to serve the national interest to a substantially greater extent than the majority of his or her colleagues. USCIS does not seek a quantified threshold of experience or education, but rather a past history of demonstrable achievement with some degree of influence on the field as a whole. In all cases the petitioner must demonstrate specific prior achievements which establish the alien's ability to benefit the national interest. *NYSDOT*, 22 I&N Dec. 219, n.6. The AAO will therefore affirm the director's decision to deny the petition.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will also enter a finding of willful misrepresentation of a material fact. When the petitioner signed Part 8 of Form I-140, she certified that the "petition and the evidence submitted with it are all true and correct."

The petitioner signed the Form I-140 under penalty of perjury and attested that she is solely responsible for submission of evidence with this petition.

Section 212(a)(6)(C) of the Act provides:

> Misrepresentation. – (i) In general. – Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Under Board of Immigration Appeals (BIA) precedent, a material misrepresentation is one which "tends to shut off a line of inquiry which is relevant to the alien's eligibility." *Matter of S- and B-C-*, 9 I&N Dec. 436, 447 (BIA 1961). Because the petitioner has sought an immigration benefit for members of the professions holding advanced degrees, information about her advanced degrees is relevant to her eligibility.

As required by the USCIS regulation at 8 C.F.R. § 204.5(k)(4)(ii), the petitioner submitted Form ETA-750B, Statement of Qualifications of Alien, with her petition. Part 11 of that form instructs the alien to list "Colleges and Universities Attended," along with "Degrees or Certificates Received." The petitioner indicated that she attended "Eastern Visayas State Univ., Phils." where she received a "Ph.D." in "Educational Pograms [*sic*] Mgt."

In her statement accompanying the initial filing, the petitioner stated: "World Education Services . . . has credited my Doctor of Philosophy Degree (Ph.D.) in Educational Program Management." The petitioner's résumé, under "Education," likewise lists a "Ph.D. in Educational Program Management." The initial filing, therefore, contains at least three separate claims by the petitioner that she holds a Ph.D. degree.

In the "Summary of Qualifications" that accompanied the initial submission, counsel stated:

> [The petitioner] has a Ph.D. in Educational Program Management. . . .

> As a High School Math Teacher with a Ph.D. in Educational Program Management is an exceptional achievement [*sic*]. . . . Being a Ph.D., in Educational Program Management, she will design Math curriculum for Minority students, those who are "left behind" in the U.S. School System.

A transcript from [redacted] confirms that the petitioner studied for a Ph.D. in educational programs management, but the line marked "Title or Degree Conferred" is blank.

The credential evaluation report from World Education Services stated that the petitioner's academic studies are equivalent to a "Bachelor's and master's degree in education from, and one and one-half years of graduate study at, a regionally accredited institution." The report indicates that the petitioner "was enrolled in a program leading to an earned doctorate (Ph.D.)," but not that the petitioner actually completed the program or received the degree.

The petitioner's response to the notice of intent to deny included a printout from her own website, in which the petitioner added the suffix "PhD" after her name.

On February 27, 2012, the AAO sent the petitioner a notice which read, in part:

> In support of the petition, you submitted the required Form ETA 750 Part B, Statement of Qualifications of Alien. On line 11, you indicated that you studied Educational Programs Management at Eastern Visayas State University (EVSU) in the Philippines from October 1982 to March 2003. Under "Degrees or Certificates Received," you stated "Ph.D." You signed this form "under penalty of perjury," thereby attesting that the information on the form "is true and correct." On your *curriculum vitae*, you also claimed a "Ph.D. in Educational Program Management." This claim is material to your petition, because the U.S. Citizenship and Immigration Services (USCIS) regulations at 8 C.F.R. §§ 204.5(k)(3)(i)(A) and (ii)(A) list academic degrees as supporting evidence for classification under section 203(b)(2) of the Act. Your attorney, [redacted], has repeatedly referred to you as "[redacted]" and asserted that your "Ph.D. in Educational Program Management is an exceptional achievement." In this way, your attorney has specifically and directly asserted that your claimed doctorate is a favorable factor in considering the petition.
>
> [N]othing in the record shows that you received a Ph.D. [redacted] or any other institution.
>
> It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 586. Thus, you cannot overcome the above findings simply by offering a written explanation. Unless you

> are able to provide original, first-hand evidence that you received [redacted] in 2003, the AAO will conclude that you falsely claimed to hold that degree. . . .
>
> By filing the instant petition accompanied by the signed Form ETA 750 and submitting your curriculum vitae, you appear to have sought to procure a benefit provided under the Act through misrepresentation of a material fact. Unless you are able to provide substantial evidence to overcome, fully and persuasively, all of the above findings, the AAO will dismiss your appeal and enter a formal finding of misrepresentation into the record. This finding of misrepresentation will be considered in any future proceeding where admissibility is an issue. You may choose to withdraw your appeal, but this will not prevent a finding that you have sought to procure immigration benefits through willful misrepresentation of a material fact.

In response, the petitioner submits a personal affidavit. In a short cover letter, counsel states: "We hope the foregoing meets with your requirements."

The petitioner, in her affidavit, acknowledges that she did not complete her Ph.D. degree or receive a diploma. The petitioner observes that she submitted evidence that demonstrated that her degree was not complete, and asserts that these exhibits show that there was no systematic attempt to conceal her failure to complete the degree. The petitioner claims that she "never claimed to have graduated with a Ph.D.," and that any instance where she claimed to hold a Ph.D. degree (such as when she listed that degree under "Degrees or Certificates Received" on Form ETA-750B) was inadvertent and unintentional. The petitioner also claims: "In our culture in the Philippines, if one has finished the academic requirements for a Doctoral Degree, you are usually called Doctor." The petitioner submits no evidence to support this last claim, and under *Soffici*, the petitioner's unsupported claim is insufficient.

The record contains some documents that make it clear that the petitioner did not complete her doctorate, but at no point in this proceeding did the petitioner herself ever specifically state that she began, but did not complete, a course of study leading towards a Ph.D. degree. Rather, she claimed to hold a Ph.D. on at least four separate occasions, referring at one point to "my Doctor of Philosophy Degree (Ph.D.) in Educational Program Management." Given the consistency of these statements, the AAO finds that the petitioner sought to convey the impression that she actually held a "Doctor of Philosophy Degree."

The AAO finds that the petitioner knowingly and repeatedly misrepresented her academic background in an effort to mislead USCIS on an element material to the beneficiary's eligibility for a benefit sought under the immigration laws of the United States. *See* 18 U.S.C. §§ 1001, 1546. The AAO will enter a finding of willful misrepresentation of a material fact. USCIS may consider this finding in any future proceeding where admissibility is an issue.

Additionally, this finding necessarily reflects on numerous other claims that the petitioner has put forth without evidentiary support. If USCIS fails to believe that a fact stated in the petition is true,

USCIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. I.N.S.*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Moreover, the petitioner's submission of false or misleading information brings into question the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Therefore, the AAO will dismiss the appeal.

ORDER: The appeal is dismissed with a separate finding of willful misrepresentation of a material fact on the part of the petitioner, [redacted]

FURTHER ORDER: The AAO finds that the petitioner, [redacted] knowingly submitted documents containing false statements in an effort to mislead USCIS on an element material to her eligibility for a benefit sought under the immigration laws of the United States.